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No. 07-1315

In the Supreme Court of the United States

MICHAEL A. KNOWLES, Warden,
Petitioner,

v.

ALEXANDRE MIRZAYANCE,
Respondent.

On Writ of Certiorari to
the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY BRIEF

EDMUND G. BROWN JR.
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
DONALD E. DE NICOLA
Deputy State Solicitor General
PAMELA C. HAMANAKA
Senior Assistant Attorney General
KRISTOFER JORSTAD
Deputy Attorney General
STEVEN E. MERCER
Deputy Attorney General
Counsel of Record
300 South Spring Street, Suite 1702
Los Angeles, California 90013
Telephone: (213) 576-1344
Fax: (213) 576-1300
Counsel for Petitioner

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PETITIONER'S REPLY BRIEF

Respondent Mirzayance does not seriously defend the Ninth Circuit's grant of habeas relief under this Court's precedent, which commands that review of ineffective-counsel claims under 28 U.S.C. § 2254 must be "highly deferential—and doubly deferential when it is conducted through the lens of federal habeas." *Yarborough* v. *Gentry*, 540 U.S. 1, 5 (2003) (per curiam). Acknowledging that relief is unavailable under § 2254(d) as interpreted by this Court, he is reduced to arguing that the deferential standard of habeas review, enacted by Congress as a cornerstone of AEDPA, should somehow be simply ignored. Inevitably, he relies on the spurious "nothing to lose" notion that can form no part of § 2254(d) review, insisting that Wager was duty-bound to present an affirmative NGI defense regardless of his professional judgment as to the merits of such a defense. And, even in arguing for "no deference" or "less deference" review despite § 2254(d), he proffers a view of the evidence that was discredited by the district court. Mirzayance is wrong on all counts.

I. UNDER 28 U.S.C. § 2254, THE CALIFORNIA COURTS' REJECTION OF MIRZAYANCE'S CLAIM IS CONCLUSIVE AND WAS CORRECT.

Mirzayance's claim, that trial counsel Wager was obliged by the federal Constitution to present a state-law affirmative defense of not guilty by reason of insanity (NGI), fails under *Strickland* v. *Washington*, 466 U.S. 668 (1984), and fails even more obviously under the "doubly-deferential" *Strickland* analysis required by 28 U.S.C. § 2254(d). See *Gentry*, 540 U.S. at 5; *Yarborough* v. *Alvarado*, 541 U.S. 652, 666 (2004).

The state courts' denial of the claim was objectively reasonable and conclusive, first, under *Strickland*'s clearly

established "prejudice" test. The expert opinions Mirzayance submitted to the state courts could not be persuasive once the jury determined that Mirzayance had premeditated and carefully deliberated the murder, a determination that signaled its rejection of defense opinion testimony about Mirzayance's alleged mental impairments. Nor could those opinions undermine confidence in the strong evidence in the state-court record of Mirzayance's consciousness of guilt. That evidence showed his self-conscious efforts to conceal his involvement in the murder, and his repeated acknowledgments just after the crime, to a friend and to police, that the killing was wrong.

The state courts' denial of the claim also proves conclusive under *Strickland*'s clearly established "performance" test. The state-court record shows that Wager's considered decision, approved by Mirzayance and made after consultation with co-counsel, was a "reasonable choice" under difficult circumstances. See *Roe* v. *Flores-Ortega*, 528 U.S. 470, 477, 479 (2000). Wager made his decision only after a thorough investigation that far exceeded what the Constitution requires. Wager retained eight doctors to evaluate Mirzayance's mental health, employed jury consultants, conducted mock trials on mental health defenses, hired an investigator who interviewed Mirzayance's friends and associates, and conferred regularly with Mirzayance's parents and their personal attorneys. Wager reevaluated the case following the jury's first-degree murder verdict, and discussed the NGI problem with his experienced co-counsel and a retained doctor, before making his final assessment that the defense could not meet its NGI burden of proof.

In granting relief despite the state courts' rejection of Mirzayance's claim on that record, the Ninth Circuit failed to heed the import of this Court's order for it to reconsider this case in light of § 2254(d) as construed in *Carey* v.

Musladin, 127 S. Ct. 649 (2006). Instead, the Ninth Circuit again reviewed the case without regard for whether the state-court adjudication was at least "reasonable" under *Strickland*. Indeed, departing even further from § 2254(d), the Ninth Circuit improperly applied a novel "sole defense/nothing to lose" corollary to the *Strickland* standard that was not part of the "clearly established Federal law" governing habeas corpus review and that is not supported by the Sixth Amendment. Finally—having failed to recognize that relief was precluded under § 2254(d)—the Ninth Circuit also failed to defer under Federal Rule of Civil Procedure 52(a) to well-supported district court factual findings that compelled rejection of Mirzayance's claim in any event. This Court now should reverse the Ninth Circuit judgment outright.

II. MIRZAYANCE'S ARGUMENTS FIND NO SUPPORT IN THE LAW UNDER 28 U.S.C. § 2254(D) OR IN THE FACTS PRESENTED TO THE STATE AND FEDERAL COURTS.

A. Mirzayance Incorrectly Relies, As The Ninth Circuit Did, On A Spurious "Nothing to Lose" Extension of This Court's Clearly Established *Strickland* Test.

Mirzayance's brief shares a central flaw with the reinstated panel opinion: it addresses only the question of error under *Strickland,* and it does so by resorting to a "nothing to lose" rule that is not part of *Strickland*. Like the panel opinion, Mirzayance's brief offers a perfunctory citation to § 2254(d)(1), but then never discusses the threshold and dispositive question under the habeas statute: whether the *state-court* decision in light of the *state-court* record was at least "reasonable" under the clearly established law of *Strickland* v. *Washington*. See *Wright* v. *Van Patten*, 128 S. Ct. 743, 747 (2008); *Musladin*,

127 S. Ct. at 654; *Lockyer* v. *Andrade*, 538 U.S. 63, 71, 75 (2003).

Although he purports to disclaim it—like the Ninth Circuit panel purported to do—Mirzayance advances the same non-*Strickland* "nothing to lose" rule that the dissenting judge twice protested. Pet. App. 14, 31-33. As Mirzayance rewords it, "counsel has a duty to present a substantial viable defense where there was an objective prospect for success and no strategic or other benefit in abandoning it." RBM 30. The parties agree, then, on this much: Mirzayance and the Ninth Circuit would impose on Wager a "duty" to proceed with the alleged NGI defense *regardless* of his professional judgment as to its merits and regardless of whether there was any "reasonable probability" of its success.

But this per se rule of performance, with its watered-down or non-existent rule for prejudice, differs radically from the clearly established constitutional rule for effective counsel adopted by this Court in *Strickland*. The "rule" proffered by Mirzayance and the Ninth Circuit cannot be reconciled with this Court's recognition that attorneys must simply make a "reasonable choice." *Roe*, 528 U.S. at 479. It is also inconsistent with this Court's recognition that attorneys are not obligated to advance all nonfrivolous claims, or defenses, or arguments, even though they theoretically might succeed and thus might be deemed "viable." See *Jones* v. *Barnes*, 463 U.S. 745, 751-54 (1983); *Evitts* v. *Lucey*, 469 U.S. 387, 394 (1985).

No holding of this Court requires the States to decide ineffective-counsel claims under such a mechanical "rule," even as Mirzayance describes it. A rule that counsel is ineffective for declining to proceed with an NGI plea just because there is "no tactical advantage to be gained" by not doing so, and the plea possibly might have succeeded, is *not* "clearly established Federal Law as determined by the

Supreme Court." 28 U.S.C. § 2254(d)(1); see *Van Patten*, 128 S. Ct. at 747; *Musladin*, 127 S. Ct. at 654; *Schriro* v. *Landrigan*, 127 S. Ct. 1933, 1942 (2007). So it cannot serve as a basis for granting habeas relief in this case.

B. Mirzayance's And NACDL's Eccentric Reinterpretations Of 28 U.S.C. § 2254 Lack Support In The Statutory Language, In Congress's Purpose In Enacting AEDPA, And In This Court's Habeas Corpus And AEDPA Jurisprudence.

Apparently recognizing the impossibility of defending the Ninth Circuit's fatal failure to apply deference—and "double deference"—to the state-court adjudication of his *Strickland* claim, Mirzayance abandons his argument that he is entitled to relief under "the usual § 2254(d) deferential approach." RBM 33-34. Instead, he argues for the first time that "a different type of analysis, necessarily *less deferential* to the state court" is warranted because the California courts summarily adjudicated his claim without holding an evidentiary hearing or providing a statement of reasons, and because the federal court in any event held an evidentiary hearing on his claim. RBM 34 (italics added).[1/]

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1. The amicus curiae brief of the National Association of Criminal Defense Lawyers (NACDL) also argues that a federal habeas court may apply a "sliding scale" of deference to a state-court adjudication commensurate with how "reasoned" a state court decision appears to a federal court conducting habeas review. See *id.* at 17-18, 25. For a summary state-court adjudication like in this case, NACDL invents this test:

> [T]he federal court would first be obligated to independently assess the merits of the constitutional question under § 2254(a). If that independent assessment reveals a constitutional violation, the federal court would not be obliged to assume that the state court's result, though decidedly wrong, was nevertheless produced by an analysis that was

Mirzayance baldly concludes that "the usual § 2254(d) deferential approach must be modified and adapted." RBM 34, 38.

Even this effort is ultimately unavailing. For, as explained above and in the Warden's opening brief, the state courts' rejection of Mirzayance's claim was not merely reasonable but also correct, and cannot be successfully challenged by resorting to a "nothing to lose"-type rule.

In any event, Mirzayance's view of § 2254(d) deference as disposable lacks merit.[2/]

1. *Mirzayance's Statutory Arguments Come Too Late.*

It is, first of all, too late for Mirzayance and amicus NACDL to present these arguments. Mirzayance never raised them in the courts below. To the contrary, he has acknowledged that federal court review of his claim was governed by this Court's well-established explanation of

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> consistent with or involved a reasonable application of clearly established federal law, and was based on a reasonable determination of the facts. Instead, the federal court would be permitted to draw the more natural and intuitive conclusion that a state court decision which reaches an incorrect result on an issue of federal constitutional law and does not even undertake to justify that result by articulating reasoning which attempts to come to terms with the governing law and operative facts is tainted by at least one of the defects enumerated in § 2254(d)(1) and (2). The combination of constitutional error found under § 2254(a) and adjudicatory defect inferred under § 2254(d) would authorize issuance of the writ.

Id. at 25-26.

2. Related issues are pending before this Court in *Bell* v. *Kelly*, No. 07-1223.

the § 2254(d) standard. See Opp. to Cert. 32-33. And this Court has never endorsed a "sliding scale" of lesser deferential review, or ever suggested that deferential review for a claim adjudicated on the merits under § 2254(d) is dependent upon whether the state court provided an evidentiary hearing or a written explanation in denying a collateral claim against a final judgment. Nor did Mirzayance raise these arguments in opposition to the Warden's certiorari petition. See Sup. Ct. R. 24.1(a). Finally, the certiorari petition does not raise or fairly subsume the question of whether the federal court was entitled to grant a writ on grounds that it could afford less deference to the state-court adjudication than that required under the "contrary to," "unreasonable application of," and "clearly-established Federal law" provisions of § 2254(d) as expounded in this Court's precedents. See Sup. Ct. R. 14.1(a).

2. *Section 2254(d) Deferential Review Is Not Conditioned On State-Court "Statements of Reasons" Or State-Court Evidentiary Hearings.*

Neither a state-court evidentiary hearing, nor a state-court "statement of reasons" for denying relief, is a prerequisite for the deferential federal review of the state court's ultimate ruling under § 2254(d). Certainly, Congress included no language in AEDPA specifically imposing such alleged requirements. Where Congress in AEDPA actually sought to condition new protection for state judgments on the state courts' compliance with certain procedures, it has shown that it knows how to set out express provisions for that. See, *e.g.*, 28 U.S.C. § 2261. It did no such thing here.

a. Like most if not all state judicial systems, California courts have made clear their procedures for considering habeas corpus claims. In essence, California courts deal

with them as if by way of motion to dismiss or summary judgment, generally assuming the petitioner's allegations to be true and then faithfully bringing to bear on them the federal constitutional law as the state courts interpret it. The Ninth Circuit has recognized, and Mirzayance does not dispute, that state-court rulings rendered through such procedures are "adjudications" on the "merits" of the federal claim. See *Griffey* v. *Lindsey*, 345 F.3d 1058, 1066, *vacated as moot*, 349 F.3d 1157 (9th Cir. 2003); *Visciotti* v. *Woodford*, 288 F.3d 1097, 1104-05 (9th Cir.), *rev'd on other grounds*, 537 U.S. 19 (2002); *Hunter* v. *Aispuro*, 982 F.2d 344, 347-48 (9th Cir. 1992); *Harris* v. *Superior Court*, 500 F.2d 1124, 1128 (9th Cir. 1974) (en banc); and see, *e.g.*, *People* v. *Duvall*, 886 P.2d 1252, 1258-59 (Cal. 1995); *People* v. *Romero*, 883 P.2d 388, 391 (Cal. 1994). That is, by its plain terms, all that § 2254(d) requires in order to trigger deferential review by the federal habeas court. It would be absurd to suggest that, despite California's long-standing and recognized procedures, there was no adjudication on the merits of Mirzayance's ineffective-counsel claim simply because there was no state-court evidentiary hearing or statement of reasons.

Neither Mirzayance's nor NACDL's brief identifies any federal circuit that has adopted such a judge-made evisceration of the § 2254(d) limitations on habeas corpus adopted by Congress. To the contrary, in the twelve years since the adoption of AEDPA, the federal appellate courts have consistently found summary or unexplained denials of collateral relief by the state courts to be merits adjudications subject to full deferential review under § 2254(d). *E.g.*, *Greene* v. *Lambert*, 288 F.3d 1081, 1089 (9th Cir. 2002); *Wright* v. *Secretary*, 278 F.3d 1245, 1254 (11th Cir. 2002); *Sellan* v. *Kuhlman*, 261 F.3d 303, 310-12 (2d Cir. 2001); *Bell* v. *Jarvis*, 236 F.3d 149, 158-62 (4th Cir. 2000) (en banc); *Harris* v. *Stoval*, 212 F.3d 940, 943 (6th

Cir. 2000); *Aycox* v. *Lytle*, 196 F.3d 1174, 1177 (10th Cir. 1999); *Schaff* v. *Snyder*, 190 F.3d 513, 523 (7th Cir. 1999); *James* v. *Bowersox*, 187 F.3d 866, 869 (8th Cir. 1999). Section 2254(d) mandates deference to the state court's result, not its reasoning. *Early* v. *Packer*, 537 U.S. 3, 8 (2002) (per curiam) (section 2254(d) does not even require awareness of this Court's precedent, so long as neither the reasoning nor the result of the state-court decision contradicts them). To condition deference on the quality of the state court's reasoning, as Mirzayance and NACDL propose, "would place the federal court in just the kind of tutelary relation to the state courts that the recent amendments are designed to end." *Henon* v. *Cooper*, 109 F.3d 330, 335 (7th Cir. 1997).

The § 2254(d) standard, moreover, applies logically to both "unexplained" decisions and to non-evidentiary-hearing decisions. The § 2254(d) inquiry is simply whether the state court's adjudication of the claim resulted in a "decision" that is "contrary to" or that involved an "unreasonable application" of "clearly established Federal law." A reviewing court discerns this—as countless federal courts have done over the years—by considering the evidence presented to the state court in light of the petitioner's legal claim and determining whether the state court's decision reasonably conforms with this Court's precedents.

With respect to "unexplained" rulings, an example is presented by *Lambrix* v. *Singletary*, 520 U.S. 518 (1996). There, this Court had no difficulty denying relief under the "new rule of constitutional law" test of *Teague* v. *Lane*, 489 U.S. 255 (1989)—a standard very much like that of "clearly established Federal law" under § 2254(d), *Williams* v. *Taylor*, 529 U.S. 362, 410, 412 (2000)—even though the *state court* had barred the prisoner's claim on procedural grounds without invoking any constitutional rule or

reaching the merits at all. 520 U.S. at 522-25.

The process is also like that employed every day by the federal appellate courts in reviewing federal district court decisions that might not be accompanied by a written or oral analysis of the defendant's factual claim in light of the governing law. When reviewing a lower court's ruling deferentially, the federal appellate courts traditionally assume that the lower court made any and all determinations required to support its ruling—and, indeed, the appellate court will uphold the ruling on any available legal or factual ground, even if the lower court ignored that ground and erroneously relied on different grounds altogether. See *United States* v. *Wheaton*, 517 F.3d 350, 369 (6th Cir. 2008) (although the district court incorrectly described evidence underlying its finding, the existence of such evidence in the record supports the finding); *Hammon* v. *DHL Airways, Inc.*, 165 F.3d 441, 445 (6th Cir. 1999) (appellate court may affirm the district court where it reached the right result for the wrong reason); *Payne* v. *Churchich*, 161 F.3d 1030, 1038 (7th Cir. 1998) (if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason); *United States* v. *Twine*, 853 F.2d 676, 681 (9th Cir. 1988) (appellate court may affirm a district court ruling that lacks specific findings of fact or law if the record reasonably supports the result). It would be anomalous if the federal courts were to afford the state courts less deference. See *Francis* v. *Henderson*, 425 U.S. 536, 542-43 (1976).

It would be especially anomalous to do so in habeas corpus cases, where the state courts stay open, beyond the call of the Constitution, to consider a prisoner's claim in collateral proceedings attacking a final judgment. There is no reason state courts then should be saddled with the expenditure of scarce judicial resources to write full

written opinions, in dealing with such attacks well after the "main event" of the trial, as well as the direct appeal, have concluded.

b. As with the alleged need for "explained" decisions, it would be costly, impractical, and unnecessary for state courts to hold evidentiary hearings for every post-conviction claim presented by state prisoners. Habeas petitioners do not always request evidentiary hearings. And, in cases such as this one, in which a team of post-conviction attorneys presents voluminous evidence, a court may reject a claim—as a matter of law on the claim as alleged—without an evidentiary hearing devoted to proving alleged facts that as a matter of law would be insufficient to make out a constitutional violation anyway.[3/] Recognizing

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3. In support of his proposed modifications to § 2254, Mirzayance wrongly conflates the California Courts' summary adjudication with a "refusal" to permit Mirzayance to develop the factual basis of his claim. See RBM 34, 38. The adequacy of a state's procedural mechanism for presenting a claim is not part of the § 2254(d) analysis. See *Miller-El*, 537 U.S. at 358-59 (Thomas, J., dissenting) (noting that the deference afforded to state court factual determinations pursuant to § 2254(e)(1) cannot be evaded "by attacking the process employed"). In any event, deciding the claim without an evidentiary hearing was not a "refusal" to permit factual development. All the claim-defining factual allegations and supporting evidence considered by the federal courts were presented by Mirzayance in state habeas corpus proceedings in the form of voluminous documents and declarations from Wager, co-counsel Boyle, the defense mental health experts, the defense investigators, a "*Strickland* expert," Mirzayance's parents, the family's attorneys James and Eric Lund, Mirzayance's childhood teachers in France, and several of Mirzayance's friends. See, *e.g.*, Exs. 1-22. The direct testimony of the key witnesses at the federal evidentiary hearing consisted of the *same declarations* filed in state court. To the extent Wager provided more testimony at the hearing, the additional details were consistent with Wager's state-court declaration. Moreover, none of the facts upon which state courts could have relied were contradicted at the federal evidentiary hearing.

this, virtually every state provides for possible summary disposition of such claims.[4/] Federal habeas rules similarly provide for dismissal of habeas petitions without an evidentiary hearing. See Rules 4 and 8(a) of the Rules Governing Section 2254 Cases in the Federal District Courts; see also Fed. R. Civ. P. 56(c).

Mirzayance's complaints about his own state habeas proceedings are particularly unconvincing. California habeas corpus courts provisionally assume that a prisoner's factual allegations, if adequately pled, are true for purposes of determining if he has made out a prima facie case for relief. *Duvall*, 886 P.2d at 1258-59; *In re Clark*, 855 P.2d 729, 741 n.9 (Cal. 1993); *In re Lawler*, 588 P.2d 1257, 1259 (Cal. 1979). For the prisoner, that is better than an evidentiary hearing in which the state may disprove his factual claims. Here, Mirzayance presented to the state

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4. See, *e.g.*, Ala. R. Crim. P. 32.7(d); Alaska R. Crim. P. 35.1(f); Ark. R. Crim. P. 37.3; Ariz. R. Crim. P. 32.6(c); Cal. Penal Code § 1484; Colo. R. Crim. P. 35(c)(3)(IV); Del. Super. Ct. Crim. R. 61(d) & (h); Fla. R. Crim. P. 3.850(d); Ga. Code Ann. § 9-14-40, et seq.; Haw. R. P. P. 40(f); Idaho Code § 19-4906(b)-(c); Ill. Comp. Stat. § 5/122-2.1(a)(2); Ind. Post-Conviction Rule 1(4)(g); Iowa Code § 822.6; K. S. A. § 60-1507; Ky. R. Crim. P. 11.42; La. Code Crim. art. 928-929; Mo. R. Crim. P. 70; Mass. R. Crim. P. 30(c)(3); Mich. R. Crim. P. 6.504(B); Minn. Stat. § 590.04; Miss. Code Ann. § 99-39-11(2); Mo. R. Crim. P. 29.15(h); Mont. Code Ann. § 46-21-201; Neb. Rev. Stat. § 29-3001, *State* v. *Gray*, 612 N.W.2d 507 (Neb. 2000); Nev. Rev. Stat. § 34.770; N.J. Rules of Court 3:22-9; N.M. R. Dist. Ct. R.C.R.P. 5-802E(1); N.Y. Crim. Pro. Law § 440.30(d) and (4); N.C. Gen. Stat. § 15A-1420(c)(1), (c)(3); N.D. Cent. Code § 29-32.1-09; Ohio Rev. Code Ann. § 2953.21; Or. Rev. Stat. § 138.525; Pa. R. Crim. P. 907(1), 909(B); R.I. Gen. Laws § 10-9.1-6(b) (1956); *Wood* v. *State*, 184 S.E.2d 702, 704 (S.C. 1971); Tenn. Code Ann. §§ 40-30-106, 40-30-108; Tex. R. Crim. P. 11.07; Utah Code Ann. § 78B-9-101, et seq., Utah R. Civ. P. 65C; Vt. Stat. Ann. 13, § 7131, et seq., *In re Gould*, 852 A.2d 632 (Vt. 2004), *In re Thompson*, 697 A.2d 1111 (Vt. 1997); Wash. Rev. Code Ann. § 10.73.140; W. Va. Code Ann. § 53-4A-3(a); Wis. Stat. Ann. § 974.06(3); Wyo. Stat. Ann. § 7-14-101, et seq.

courts the same factual allegations, documentary evidence, and declarations of key witnesses that he later presented in his habeas corpus petition in the federal court. The California Court of Appeal and the California Supreme Court summarily rejected Mirzayance's ineffective-counsel claim on the merits without requiring him to prove his factual assertions at an evidentiary hearing—just like the federal district court rejected that claim as a matter of law when first confronted with it. Pet. App. H, I, J.

This Court's opinion in *Panetti* v. *Quarterman*, 127 S. Ct. 2842 (2007), relied upon by Mirzayance, does not compel a contrary conclusion. See RBM 37. *Panetti* involved a claim in which the petitioner alleged he was not competent to be executed under the standards of *Ford* v. *Wainwright*, 477 U.S. 399 (1986). In addressing Panetti's *Ford* claim, this Court determined it was "unencumbered by the deference AEDPA normally requires" because the state court's "failure to provide the procedures mandated by *Ford* constituted an unreasonable application of clearly established law as determined by this Court." 127 S. Ct. 2855. This result hardly compels the application urged by Mirzayance—that a federal habeas court may apply a "modified" and "less deferential" version of § 2254(d) if it finds California's habeas corpus procedures inadequate. RBM 34, 37. Unlike the constitutional competency "procedures mandated by *Ford*" that were at issue in *Panetti*, there is no constitutional rule or "clearly established Federal law" dictating that state habeas courts must issue explained decisions or provide evidentiary hearings when rejecting a state prisoner's collateral attack on the validity of a final criminal judgment. See *Pennsylvania* v. *Finley*, 481 U.S. 551, 557, 559 (1987) (states have no obligation under the Constitution to provide for collateral attack upon a final criminal judgment; when they opt to do so, they need not implement any particular

process for a prisoner to pursue collateral relief).

This Court has recognized that state courts take seriously their obligation to enforce the Constitution as "coequals" with the federal courts in their ability to interpret it and apply its terms. *Sawyer* v. *Smith*, 497 U.S. 227, 241 (1990). Congress's enactment of AEDPA stands as testimony to its solemn judgment that the state courts are to be trusted as the primary enforcers of the Constitution in state criminal cases. A plain reading of § 2254(d)—as opposed to Mirzayance and NACDL's suggested "modification"—is consistent with the purposes of AEDPA to prevent federal habeas retrials and restrict the issuance of the writ. As this Court has explained, AEDPA "modified a federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas retrials and to ensure that state-court convictions are given effect *to the extent possible under law.*" *Bell* v. *Cone*, 535 U.S. 685, 693 (2002) (italics added). Cutting back on AEDPA's solicitude for state-court judgments, for state-procedure reasons such as those given by Mirzayance and NACDL, would contradict Congress and risk insult to the state courts.

The adequacy of a state's procedural mechanism for presenting a claim is not part of the § 2254(d) analysis. See *Miller-El* v. *Cockrell*, 537 U.S. 322, 358-59 (2003) (Thomas, J., dissenting). A state's post-conviction process has no bearing on whether the state court's merits adjudication was "contrary to, or involved an unreasonable application of, clearly established federal law." § 2254(d)(1).

3. *Habeas Corpus Courts May Not Circumvent § 2254(d) Deferential Review Of State-Court Decisions By Receiving New Evidence In Federal Hearings.*

Mirzayance also contends that a "modified application of § 2254(d) is required" in his case because an evidentiary hearing in federal court assertedly developed some different facts to support his claim. RBM 35. In place of the "double deference" standard for state-court rulings on *Strickland* claims, he manufactures his own test:

> [T]he federal court can ask whether the state court's result is wrong and, if so, the federal court can grant relief on the ground that a state court decision "involves an unreasonable application" of federal law (within § 2254(d)(1)) when the state court has so far deviated from the proper process for applying federal constitutional law as to make an incorrect ruling on a federal claim . . . .

RBM 37. But this test, seemingly borrowed from the NACDL brief on a different point entirely, appears to have nothing to do with the absence of an evidentiary hearing. In the alternative, Mirzayance recommends, in effect, that the federal court should pretend that the state court had the new facts before it when it ruled and should reconsider the reasonableness of the state-court ruling accordingly. RBM 36. As indicated in footnote 6 of the Warden's opening brief, neither of Mirzayance's proposals has merit.

A federal habeas judge's mere decision to conduct an evidentiary hearing and receive evidence of facts beyond the state-court record cannot so easily eliminate Congressionally-mandated deference to state-court judgments. Under § 2254(d), relief "shall not be granted" on any claim "adjudicated on the merits" by the state court. The only exceptions are where the ruling—at the time and on the basis of the record evidence presented to it—"was"

contrary to or involved an unreasonable application of "clearly established Federal law" or was based on an unreasonable determination of the facts. Neither exception has anything to do with federal evidentiary hearings, and neither exception applies in this case.

So, regardless of whether the new evidence in federal court is said to "merely buttress" the evidence offered in support of a claim already adjudicated on the merits in state court—as Mirzayance suggests here, RBM 34—the petitioner must always meet his burden to show that the state-court merits adjudication fails to meet the deferential-review standard of § 2254(d). See *Holland* v. *Jackson*, 542 U.S. 649, 652-53 (2004) (per curiam). Evidence presented for the first time in federal habeas proceedings later may be considered by the federal court *after* the petitioner "exhausts" available state-court opportunities to fairly present the evidence and the claim to the state court. § 2254(b). If he has not forfeited merits review of his claim under state procedural law, the resultant state-court adjudication of that claim would then command § 2254(d) deference in later federal habeas proceedings.

Section 2254(d), that is, must be fully accounted for in cases where the state court adjudicated the petitioner's claim on the merits, regardless of whether a federal court chooses to hold a potentially-irrelevant evidentiary hearing on the petitioner's claim. Unless a petitioner makes out a statutory entitlement to a hearing under the special standards of § 2254(e)(1), in a case where the state-court doors are closed and where § 2254(d) is not triggered, the results of such a federal hearing at best may confirm the correctness of the state court ruling. But, where the state court has reasonably adjudicated the merits of the claim based on the state-court record, such hearings are unnecessary and wasteful. For they cannot trump

§ 2254(d)'s explicit rule precluding relief in such circumstances. Where relief is otherwise precluded, the district court should not hold an evidentiary hearing. See *Landrigan*, 127 S. Ct. at 1940.

Mirzayance's reliance on *Williams* v. *Taylor*, 529 U.S. 420 (2000), is misplaced. See RBM 35-36. Williams was not the recipient of a so-called "discretionary" grant of an evidentiary hearing on a claim already adjudicated by the state court. See, *e.g.*, *Landrigan*, 127 S. Ct. at 1944. He apparently never had a way to bring his newly-and diligently-discovered claim to the Virginia courts for a merits adjudication at all. *Williams*, 529 U.S. at 443; cf. *In re Gallegos*, 959 P.2d 290, 292-297 & n.8 (Cal. 1998); *In re Robbins*, 959 P.2d 311, 324-31 (Cal. 1998) (California habeas corpus courts remain open to consider second-petition claims when diligently discovered and presented). Williams thus satisfied the special evidentiary provision contained in § 2254(e)(1); at the same time, § 2254(d) was by its terms inapplicable because there had been no opportunity for a state-court adjudication of his claim in the first place.

Mirzayance is not like Williams. Mirzayance was never denied an opportunity to bring his evidence or claims to the California courts for adjudication on the merits. Indeed, he filed in the state courts the same affidavits and documents he later filed in the federal proceedings. The state courts, rather than requiring proof in an evidentiary hearing, provisionally assumed his allegations were true for the purpose of determining the legal question of whether the alleged facts made out a violation of his constitutional rights. The state courts' determination that Mirzayance's rights were not violated was an "adjudication on the merits" that must receive the full measure of deferential review that this Court has held to be required by § 2254(d). A federal evidentiary hearing producing "new" evidence is

extraneous to that dispositive question.

C. Mirzayance Relies On An Interpretation Of The Facts Belied By The Record And Rejected In The District Court's Well-Supported Findings.

Next, Mirzayance's brief argues—irrelevantly and unpersuasively—that the evidence from the federal evidentiary hearing, viewed in a light most favorable to him, shows that Wager rendered ineffective counsel under *Strickland*. RBM 25-26, 46-50, 57. Mirzayance, however, does not dispute that the record provided the district court with reasonable support for key factual findings that only confirm the correctness of the state-court result. Nor does Mirzayance suggest that the Ninth Circuit found any of the district court's factual findings to be assailable as "clearly erroneous" under Federal Rule of Civil Procedure 52(a). So—even if the Ninth Circuit somehow would have been entitled, despite § 2254(d), to grant habeas relief to Mirzayance based on a federal evidentiary hearing—it was still wrong to contradict the district court's findings of fact.

As explained by the dissenting judge, "[t]he factual questions involved in this inquiry were resolved against [Mirzayance]" following a "four-day evidentiary hearing." Pet. App. 14, 32.[5/] Among other findings, the district court concluded: that trial counsel's "decision was carefully considered, not rashly made," with the concurrence of "experienced co-counsel"; and that, even if Mirzayance's parents might not have "*expressly refused* to testify," "they expressed a pronounced reluctance to do so, which amounted to the same thing." See Pet. App. 69-76. The

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5. Mirzayance overlooks that these rather non-controversial statements were made by the dissenting judge. Therefore, this was not, as Mirzayance alleges, an "inaccurate summary characterization" made by the Warden. See RBM 9.

district court's factual findings could only have compelled the denial of relief, but the Ninth Circuit ignored them in derogation of the "clear error" standard of review.

1. Rather than address the "clear error" issue raised in the certiorari petition, Mirzayance simply reargues his version the facts. For example, Mirzayance asserts that Wager's performance was deficient because it was based on his alleged "misapprehension" of the legal difference between the mental state for first-degree murder and the mental state for insanity under California law. See RBM 8, n.6, 9, 40-41, 51-54. But he makes that assertion without the benefit of any finding by either the district court or the Ninth Circuit.

In fact, the evidentiary hearing record does not support Mirzayance's claim that Wager misunderstood the law and that his misunderstanding caused him to recommend forgoing the NGI plea. Instead, the record shows a completely different set of events. First, the record supports the district court's findings that the jury's verdict—that the murder was "willful, premeditated, and deliberate"—signaled the failure of the defense's strategy of seeking a verdict no worse than *second*-degree murder and then securing an NGI verdict. Further, as the district court also reasonably found, Wager remained willing to proceed with a sanity phase *despite* the verdict of first-degree murder. See Pet. App. 69-70. Wager, however, believed that, in light of the jury's mental-state findings, any remaining chance of securing an NGI verdict depended on presenting some "emotional impact" testimony by Mirzayance's parents, "which Wager had viewed as key even if the defense *had* secured a second-degree murder verdict at the guilt phase." Pet. App. 42, 48, 51, 70-71. Wager, indeed, testified that the parents' "refusal to testify on behalf of their son"—not the verdict—was the ultimate "triggering event" that, in light of all the circumstances, led

to his decision to withdraw the NGI plea. EHT Vol. I at 70.

Contrary to Mirzayance's claim that counsel misunderstood the law, Wager concluded that the jury's first-degree murder verdict meant only that the NGI defense was unavailable "[u]nder the *facts* of this case"—not that it had become "legally" unavailable. See EHT Vol. I at 8 (italics added). In clarifying a previous answer, Wager explained:

> I didn't mean to leave that impression. The impression I meant to leave by that answer was that, once the jury had found that he had maturely and meaningfully deliberated and premeditated, they had unknowingly decided that he had—he knew the consequences of his actions and the nature and quality of his actions although they didn't know it. But in order to find, therefore, that he was insane, [they] would have to *in effect* disregard their earlier findings.

EHT Vol. I at 125 (italics added). Wager's assessment that the jury in effect had determined that Mirzayance could appreciate the "nature and quality of his actions" was, as the district court found, "reasonable." In his testimony, Wager logically explained how the NGI case was doomed after both the jury's finding of premeditation and deliberation *and* the parents' refusal to testify—not as a legally-prohibited verdict under California law, but as a practical matter "under the facts of this case." EHT Vol. I at 53-55, 60, 65, 88, 125, 137, 139-40.[6/]

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6. Mirzayance also faults the Warden for describing Wager as "well versed in mental health and sanity issues," a characterization he claims is "not supported by Wager's testimony." RBM 10, n.8. But the Warden's characterization was supported by Mirzayance's family attorney James Lund, who vetted Wager and other "defense counsel candidates," before ultimately selecting Wager. In his declaration submitted to the state and federal courts, Lund described Wager's qualifications, which included:

2. Mirzayance also tries to minimize the fact, noted in the Warden's opening brief, that Dr. Anderson, one of the state court's appointed experts, had found Mirzayance was sane in that he "was capable of understanding the nature and quality of his actions and the rightness and wrongness of them—at time of present offense." See RBM 25-26; Ex. 25 at 4, 12-13; EHT Vol. III 10-11. Mirzayance contends that it is ambiguous whether Dr. Anderson was reporting Mirzayance's perspective at the time of the *interview* or at the time of the *homicide*. RBM 26, 47. But this is not the forum for second-guessing how the district court viewed the evidence. The district court reviewed Dr. Anderson's written report and observed his live testimony. They provided reasonable support for the district court's finding that:

> Dr. Anderson "reported putting a 'direct query' to [Mirzayance] as to whether he had felt 'it was right or wrong to stab or shoot the victim.' According to Dr. Anderson, [Mirzayance] responded that he felt 'that these actions were wrong at the time of the present offense.'"

> A) his 10 years experience with the Los Angeles County DA's Office, during which time he was the mentor and supervisor of now District Attorney Gil Garcetti; B) his role in the DA's office as the supervising expert on mental and insanity issues; C) his experience in having tried over 100 criminal cases before juries, thirty of which were as a private practitioner during the last ten years; D) his having tried over fifteen homicides to verdict before juries as a private practitioner; and E) his role as an officer and lecturer in various criminal law bar activities.

Ex. 9 at 1-2. Mirzayance has never disputed these described qualifications, and the lower courts could properly consider them when assessing whether Wager had made an "informed" decision. See Pet. App. 32.

Pet. App. 65. Because that finding cannot be deemed "clearly erroneous," it is binding on appeal.

In any event, a reasonable interpretation of the report is that Mirzayance in fact had admitted knowing at the time of the killing that his actions were wrong. A competent attorney, confronting that report in assessing whether the defendant could meet his burden of proof on the already long-odds insanity gambit, reasonably could conclude that it severely diminished the prospects of such a defense, if it did not foreclose it altogether.

3. In a similar vein, Mirzayance misses the point in arguing against the district court's finding that his parents' views about testifying amounted to a "refusal." RBM 56. Mirzayance does not dispute that the record nevertheless provided legally adequate support—to bind the appellate court—for the district court's conclusion that the parents' conduct amounted to the "same thing" as a refusal to testify and that Wager reasonably concluded that the parents' refusal was a "done deal" and "one that any beseeching on his part could not undo." Pet. App. 71-76. And Mirzayance—like the Ninth Circuit opinion—fails to discuss the most pertinent *Strickland* question of whether, in light of their expression of reluctance, a reasonable lawyer would have concluded that he could not rely on the parents to support an NGI defense. See *Strickland*, 466 U.S. at 690-91.

4. Finally, although he tries to ignore it, Mirzayance does not dispute that the district court found that Wager had made a "rational, carefully considered, and informed decision to forgo the insanity defense." Pet. App. 32. Nor does he dispute that these findings were supported by the record and thus could not be supplanted by the appellate court. Fed. R. Civ. P. 52(a); *Anderson* v. *Bessemer City*, 470 U.S. 564, 573-74 (1985). Unable to defend the panel's disregard of those findings, Mirzayance tries to brush them

aside as "irrelevant to the *Strickland* issue." RBM 25, 49. But finding that Wager's decision was "rational, carefully considered, and informed" is patently "relevant" to whether he made a "reasonable choice." See *Roe*, 528 U.S. 479. And, as *Strickland* explains, informed decisions, i.e., those made after "thorough investigation of law and facts" are "virtually unchallengeable." *Id.* at 90-91. Moreover, the reasonableness of counsel's challenged conduct must be judged "on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.*

Although the district court's evidentiary hearing was unwarranted in a § 2254(d) case where relief was precluded as a matter of law in light of the state-court record, see pp. 7-14, *ante*, its findings in any event confirm that Mirzayance's constitutional claim is meritless. The Ninth Circuit, having erred in failing to review the state courts' ruling with deference under § 2254(d), erred again when it overruled the district court's findings despite their validity under Federal Rule of Civil Procedure 52.

CONCLUSION

The judgment of the court of appeals should be reversed.

Dated: October 31, 2008

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of California

DANE R. GILLETTE
Chief Assistant Attorney General

DONALD E. DE NICOLA
Deputy State Solicitor General

PAMELA C. HAMANAKA
Senior Assistant Attorney General

KRISTOFER JORSTAD
Deputy Attorney General

STEVEN E. MERCER
Deputy Attorney General
Counsel of Record
Counsel for Petitioner